ADMIRALTY*

By COURTNEY WILDER STANTON**

It is well to admit at the outset that the author of this survey of certain work of the United States Court of Appeals for the Fifth Circuit is aware that the bulk of the readers will have only a passing acquaintance with that portion of our national jurisprudence which is commonly referred to as the law of admiralty. At the same time, the reader must share an equal awareness that we are neither equipped nor are we desirous of converting a periodic survey of court decisions into an exhaustive and meaningful treatise of law. For the reader who might be sufficiently interested to desire better background than this article with its limitations can convey, a published and generally widely available treatise by Professors Gilmore and Black entitled *The Law of Admiralty*[1] is enthusiastically recommended. This well-organized work of approximately eight-hundred pages is perhaps the most readable of the law-school treatises and stands as current testimony supporting the proposition that neither dullness nor complexity is necessary prerequisite for soundness in legal writing.

The reader needs to be aware at the outset that the term "admiralty" is commonly utilized to identify three non-identical areas of legal concern. First, it is a basic concept of jurisdiction surrounding the exercise of judicial power by those courts which sit in determination of cases and other matters having a maritime or maritime-related flavor. Second, and increasingly important, particularly within the territorial jurisdiction of the Fifth Circuit, admiralty is a concept which represents a choice of laws.[2] Third, it represents a body of laws, many of ancient and traditional origin, some relatively new and representing both statutory and decisional law-making processes.[3]

Like other bodies of substantive law, the maritime law has its own share of idiosyncrasies, many of them of recent judicial origin. At some point, the reader of any work in the area of seamen and seamen's rights is bound to entertain the notion that he has stepped through a looking-

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* The opinions expressed in this article are not made by the author in his official capacity. The article should be read and considered accordingly.

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1. G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY (1957) [hereinafter cited GILMORE & BLACK].

2. Evans v. La. Dep't. of Highways, 430 F.2d 1280 (5th Cir. 1970).

3. GILMORE & BLACK at 2-18, 40, 42.

glass into a decision-formulated wonderland that defies sense and sensibility. In such a case, the reader should not lose his self-confidence for he has neither lost sight of the picture nor somehow failed to grasp any basic, reality-oriented logic underlying the corpus of the law. If, on the other hand, the reader is not thoroughly bewildered at the apparent lack of reality reflected by the decisions, then he has at some point failed to fully digest the concept of the cases. In any such case, the reader should bear in mind that the apparent inconsistencies and unreal applications are not the result of the misuse of terminology nor any misunderstanding on the part of the writer of this article nor, in all fairness, on the part of the members of the court whose decisions and opinions this article is intended to survey, for the latter have simply reflected the higher and/or previous authority the application of which is compelled by the rudiments of stability, certainty and judicial integrity.

Many of the cases in the past year in the Fifth Circuit represent nothing more than applications of the well-settled admiralty rule of appellate review that the clearly erroneous stricture of Rule 52(a) of the Federal Rules of Civil Procedure binds the appellate court upon review.[4]

> In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous. No greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A. . . . . [A] finding is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed."[5]

The writer does not believe there is much of legal value in any lengthy discussion on the factual situations found, sometimes somewhat reluctantly, by the Fifth Circuit not to be clearly erroneous, and we consequently reject this temptation. As a result, we will confine the scope of this survey to a discussion of legal principles and will restrict the utilization of factual cases to the sole purpose of illustrating the applicability or nonapplicability of the scope and/or restrictions upon the principles dealt with by the court during the period of the survey.

4. Daniels Towing Serv., Inc. v. Nat Harrison Associates, Inc., 432 F.2d 103 (5th Cir. 1970).
5. McAllister v. United States, 348 U.S. 19, 20 (1954).

JURISDICTION AND PRACTICE

Several cases decided during the period of this survey involved the active question of admiralty jurisdiction.[6] While the "basic locality" test generally accepted as determinative of admiralty jurisdiction in tort-type cases was not questioned,[7] issues arose concerning its application and the nature of the locality.

Several commendably imaginative attempts to extend admiralty jurisdiction beyond its traditional and hence constitutional bounds met well-deserved failure. A bridge, like a pier, has long been recognized as an extension of the land which cannot be characterized by the navigable waters over which it might possibly be erected for purposes of finding a locality source of admiralty jurisdiction.[8] As a result, an injury which occurs on a bridge is not a basis for alleging a maritime tort within the admiralty jurisdiction.[9] A singular exception might occur where the claim alleges negligence in the operation of a vessel resulting in injury to or occuring upon a bridge structure, provided that the statute purporting to extend admiralty jurisdiction is constitutional.[10]

An attempt by an employee of the Louisiana Department of Highways to obtain Jones Act[11] relief for injuries sustained when he was injured while climbing through the substructure of a horizontal-swing

6. While the question of jurisdictional source is latent in all federal cases as a result of the non-general nature of federal jurisdiction, most cases invoking the maritime jurisdiction are traditionally and clearly within the reserve of the jurisdictional confines. The active questions principally arise as a result of attempts to fix a federal forum where for lack of requisite diversity or an essential, substantial federal question such a forum would not otherwise be available or to secure enlarged procedural and/or substantive rights. By way of current example *see* 430 F.2d 1280.

7. During the survey period the doctrine of tort liability was discussed in Watz v. Zaptata Off-Shore Co., 431 F.2d 100, 109-11 (5th Cir. 1970). The discussion contained in the opinion accompanying this decision is both sound and concise and the overall opinion is highly readable. This opinion is of casebook quality and represents a good departure point for the student or attorney seeking to gain an understanding of the perimeters of admiralty jurisdiction.

8. Rodrique v. Aetna Cas. & Sur. Co., 395 U.S. 352, 360 (1969).

9. *Id. See also* 430 F.2d 1280.

10. The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land. 46 U.S.C. § 740 (1964). We have long doubted the constitutionality of this rather recent, purported extension of admiralty jurisdiction. The reader is invited to attempt to reconcile the decision in the long-standing case of *The Plymouth*, 70 U.S. (3 Wall.) 20 (1865) with the statute in question. Courts being as they are, however, it is unlikely that a decision limiting jurisdiction in such a non-burdensome area will ever be forthcoming.

11. 46 U.S.C. § 688 (1964).

drawspan was unsuccessful for want of basic admiralty jurisdiction.[12] The panel commented on the fact that the bridge involved did "not float;"[13] however, another panel decision indicates that even flotation, such as that involved in a pontoon bridge, would not afford a maritime flavor to claims for injury thereupon sustained.[14]

The "locality alone" test defining admiralty jurisdiction in court matters was the subject of one of the better opinions issued during the survey period.[15] The recommendation of a noted study group[16] that the statutory grant of admiralty and maritime jurisdiction[17] be amended to require locality plus maritime nexus was expressly considered and rejected in light of what appears to be indisputably sound interpretations of controlling Supreme Court authority.[18]

Another case[19] involved a unique twist upon the application of *Weinstein v. Eastern Airlines, Inc.*[20] to pilots who were killed as a result of a mid-air collision over the Gulf of Mexico. The exact moment and physical cause of each death was not indicated in the opinion and the panel, rather surprisingly, appeared to miss entirely the potential distinction between an injury occurring upon the navigable waters and one occurring in the free air space above the navigable waters.

The contractual aspect of admiralty was jurisdictionally explored on rehearing by a panel decision.[21] Beginning with the high-level abstraction that the maritime nature and character of a transaction is determinative of admiralty jurisdiction, the court wrestled with a complicated contract which included a long-term (five-year) bareboat[22] charter coupled with an option to purchase during the term of the charter. The basic proposition that a ship-sale contract is not maritime in nature was

12. By disposing of the claim on jurisdictional grounds, the court did not reach the question of Evans' doubtful status as a seaman for Jones Act purposes. An alternative claim for relief under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (1964), also proved to be a loser.

13. 430 F.2d at 1281.

14. Cookmeyer v. La. Dep't of Highways, 433 F.2d 386 (5th Cir. 1970).

15. 431 F.2d 100.

16. ALI STUDY OF THE DIVISION BETWEEN STATE & FEDERAL COURTS, ADMIRALTY & MARITIME JURISDICTION § 1316(a) (1969).

17. 28 U.S.C. § 1333 (1964).

18. Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469, 477-78 (1922).

19. Hornsby v. The Fishmeal Co., 431 F.2d 865 (5th Cir. 1970).

20. 316 F.2d 758 (3d Cir. 1963), *cert. denied*, 375 U.S. 940 (1963). *See* 16 MERCER L. REV. 338 (1964).

21. Jack Neilson, Inc. v. The TUG PEGGY, 428 F.2d 54 (5th Cir. 1970).

22. A charter party providing generally for the charterer to crew, provision and operate the demised vessel. GILMORE & BLACK at 215-19.

noted.[23] Equally basic is the characterization of charter-parties as maritime contracts. The court distinguished the decision in *The ADA*[24] where the charterer had an option to purchase at the end of the charter term for the sum specified in the charter party as the hire. Adopting the Fourth Circuit rule that claims may arise under lease-purchase agreements that are clearly fonded upon the leasing provision,[25] the court looked to the exact subject-matter of the dispute—the bareboat charter—and decided in favor of admiralty jurisdiction.[26] This thoughtful and well-structured opinion is well-worth reading.

Procedure and general-practice decisions sufficiently significant to be worthy of mention in this survey were not particularly numerous. With a firmer grasp of the obvious than some members of its bar, the court had occasion to hold that the summary dismissal provisions of Federal Rules of Civil Procedure 12 (b) and 56 are fully applicable to claims invoking the admiralty and maritime jurisdiction of the district courts.[27] In the same basic vein, it was held that an attachment subjecting the res to the court's jurisdiction is a prerequisite to a finding of in rem liability.[28]

The basic principles of equity are applicable to admiralty causes.[29] Consequently, a district court may reopen and modify its decrees and judgments entered in admiralty actions, and an appellate court will not interfere except where there has been an abuse of such discretion.[30]

On the subject of appellate review, the interlocutory-appeals-in-admiralty provision of the Judicial Code[31] is no *carte blanche* for piecemeal review of pending maritime cases.[32] The Fifth Circuit has lined up with several other circuits which have construed the statutory phrase "determining the rights and the liabilities of the parties" to require that the interlocutory order contain a determination of substantive rights.[33]

While the Fifth Circuit will not adopt any absolute rule requiring

23. GILMORE & BLACK at 25-6.

24. 250 F. 194 (2d Cir. 1918).

25. Flota Maritima Browning De Cuba, Sociadad Ancmina v. Snobl, 363 F.2d 733, 736 (4th Cir. 1966).

26. 428 F.2d at 60-1.

27. Nolan v. Coating Specialist, Inc., 422 F.2d 377 (5th Cir. 1970).

28. Dow Chemical Co. v. BARGE U.M. 23B, 424 F.2d 307 (5th Cir. 1970).

29. Merrill-Stevens Dry Dock Co. v. M.V. "Laissez Faire," 421 F.2d 430 (5th Cir. 1970); Compania Anonima Venezolana De Nav. v. A.J. Perez Export Co., 303 F.2d 692, 699 (5th Cir. 1962).

30. 421 F.2d 430.

31. 28 U.S.C. § 1292 (a)(3) (1964).

32. Wallin v. Keegan, 426 F.2d 1313 (5th Cir. 1970).

33. *Id.*; Miskiewicz v. Goodman, 341 F.2d 828 (4th Cir. 1965); Rogers v. Alaska S.S. Co., 249 F.2d 646 (9th Cir. 1957).

admiralty courts to itemize awards of damages,[34] the desirability of itemization by the usual, relevant categories in cases of even moderate complexity was stressed in an opinion by the Chief Judge.[35] Where a failure to itemize results in an uncertainty on review as to any relevant factor, the case most probably will be reversed and remanded for additional findings.[36] The lesson should be clear and one well worth heeding. In fact, there is no reason why such itemization should not become more the rule than the exception. If so, this could be one of the more important works of the court during the survey period.

Admiralty's freedom from the ordinary rules of evidence was again stressed.[37] Specifically, an admiralty court will not indulge in the presumption of adverse testimony because of a party's failure to call or account for known witnesses.[38]

On the other hand, even though the typically elaborate rules of evidence are given a liberal construction in a suit in admiralty tried by a judge without a jury, such a liberal construction has never been utilized to deny a litigant crucial rights of confrontation and cross-examination.[39] Since the basic purpose of the hearsay rule of exclusion is to prevent a denial to such a litigant of the right of cross-examination and confrontation, survey reports and similar documents, often without supporting testimony, will not be accepted into evidence.[40]

Four cases decided during the survey year dealt with the bar of laches.[41] Two involved delays of more than four years between injury and institution of action; a third involved a delay of approximately seven years. In the two four-year cases, findings of excusable delay and resulting prejudice were sustained. Where the court is convinced that the responding party was prejudiced by the lapse of time, the analogous statute of limitations will neither be determined nor applied.[42] Furthermore, ignorance of an available remedy is not an excuse for delay in bringing an action.[43] The court found prejudice in the lack of notice to

34. Neill v. Diamond M. Drilling Co., 426 F.2d 487 (5th Cir. 1970).

35. Noble v. Bank Line Ltd., 431 F.2d 520 (5th Cir. 1970).

36. *Id.*

37. Colorificio Italiano Max Meyer, S.P.A. v. S.S. Hellenic Wave, 419 F.2d 223 (5th Cir. 1969); East-West Towing Co. v. Nat'l Marine Serv., Inc., 417 F.2d 1274 (5th Cir. 1969); Am. Cyanamid Co. v. China Union Lines, Ltd., 306 F.2d 135, 142 (5th Cir. 1962).

38. 417 F.2d 1274.

39. 419 F.2d 223.

40. *Id.*

41. 431 F.2d 100; 424 F.2d at 310-11; Byrd v. M.V. Yozgat, 420 F.2d 954 (5th Cir. 1969); Phillips v. Springfield Ins. Co., 418 F.2d 236 (5th Cir. 1969).

42. 420 F.2d 954; 418 F.2d 236; Akers v. State Marine Lines, Inc., 344 F.2d 217 (5th Cir. 1965).

43. 420 F.2d 954; 344 F.2d 217.

trigger an investigation and the dispersion and consequent unavailability of witnesses.[44] The latter reason is sound and sufficient justification for barring the action;[45] however, where the injury was disclosed and obvious at the time of occurrence, a claim of lack of opportunity to investigate is not particularly compelling. Of course, laches is a conjunctive principle. There must be both inexcusable delay *and* resulting prejudice to the defense,[46] a factor which saved the longest delay litigated during the survey period from acting as a bar to the prosecution.[47]

COLLISION

The most intersting occurrence during the survey period in possibly the most dramatic area of the law of admiralty (collision) was the successful sustaining of an inevitable accident defense by a vessel and its owner.[48] After noting that the burden of proving inevitable accident or Act of God rests heavily upon the vessel asserting such defense,[49] the court analyzed all the circumstances and concluded that the owners of certain vessels which broke loose and drifted into collision during 1965's Hurricane Betsy had acted as prudent men familiar with ways and vagaries of the sea.[50] (We have always had occasion to wonder why catastrophic occurrences and other incidents which occur without the intervention of legally cognizable human fault are always blamed on God. May we suggest that a more appropriate characterization is that of the less common *vis major*.)

A 1966 heavy fog collision between an inbound and an outbound vessel in Mobile Bay resulted in an en banc even split.[51] The basic issue on appeal was whether from the facts found in the trial of the case it could be concluded that the inbound vessel, a so-called supertanker of considerable size, was at fault for operating at excessive speed in dense fog in that she failed to stop her engines upon hearing the fog signal of the outbound vessel. Article 16 of the Inland Rules of Navigation states:

> Every vessel shall in a fog . . . go at a moderate speed, having careful regard to the existing circumstances and conditions.
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> A steam vessel hearing, apparently forward of her beam, the fog signal

44. 420 F.2d 954.
45. *Id. See also* 418 F.2d 236.
46. 431 F.2d at 111-12; 424 F.2d 307.
47. *Id.*
48. Petition of United States, 425 F.2d 991 (5th Cir. 1970).
49. *Id.*; Doudoin v. J. Ray McDermott & Co., 281 F.2d 81, 88 (5th Cir. 1960).
50. 425 F.2d 991.
51. Hess Shipping Corp. v. S.S. Charles Lykes, 417 F.2d 346 (5th Cir. 1969), *judgment adhered to*, 424 F.2d 633 (5th Cir. 1970).

> of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.[52]

It appeared that the inbound vessel was maintaining a speed of approximately four knots with the current which by undisputed estimate was one and one half knots. This resulted in a speed over the ground of between five and six knots.

The original panel majority discussed the two rules which had been applied in such cases. The first, called the "bare steerage rule," regards the term "moderate speed" under the circumstances to require that the "speed should be reduced to the lowest point consistent with good steerageway."[53] The other rule, the so-called "rule of sight," requires that "the vessel must proceed at a rate of speed which will allow her to come to a stop within one-half limit of the visibility."[54]

In any event, and regardless of the rules adopted, the concept of moderate speed as used in Inland Rule 16 is a relative term which depends upon the particular circumstances of each case.[55] In other words, whichever rule is adopted, it is tempered by and subject to analysis under the existing circumstances.[56] The majority then concluded that considering the existing circumstances, the size of the supertanker, the width of the channel, the direction and force of the current, and the force and direction of the wind, there existed a high probability that the stopping of the supertanker's engines would have resulted in her drifting crossways in the channel or otherwise partially blocking it, thus increasing the danger to other vessels in the area and enhancing the probability of a more serious collision than that which in fact occurred.[57] Any reduction in speed below the four knots which the inbound ship was maintaining would have seriously impaired her pilot's ability to control the vessel and might have resulted in a more serious accident than that which occurred. Any such reduction in speed would have been unreasonably and inconsistent with the rules of navigational safety.[58]

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52. 33 U.S.C. § 192 (1964).

53. 417 F.2d at 349; Skibs A.S. Siljestad v. S.S. Mathew Luckenbach, 215 F. Supp. 667, 679 (S.D.N.Y. 1963).

54. 417 F.2d at 349-50; O.Y. Finlayson-Forsa A.B. v. Pan Atlantic S.S. Corp., 259 F.2d 11, 20 (5th Cir. 1958).

55. Polarus S.S. Co. v. The T.S. Sandefjord, 236 F.2d 270 (2d Cir. 1956).

> "Moderate speed" is purely a relative term, which means no more than that the vessel must run at a prudent rate of speed. Time, place, and circumstance, rather than the swiftness of the vessel over her course, determine whether the actual speed was immoderate, in that it was imprudent. Quinette v. Bisso, 136 F. 825, 830 (5th Cir. 1905).

56. 236 F.2d 270.

57. 417 F.2d at 350.

58. *Id.*

A strong dissent was filed. The dissenting judge appears to have contended for an absolute rule requiring a vessel which has heard, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained to stop her engines and, after stopping, to then navigate with caution.[59] Upon rehearing the case en banc, the court stood evenly divided with the result that the majority decision stands insofar as the law of this case is concerned.[60]

It is quite probable that the *Hess Voyager* decision will be the source of debate and comment, citation, application and misapplication for a number of years. The scope of this survey does not permit a thoroughgoing, critical analysis either in support of or disagreement with the panel majority's decision. At the same time, we are left with the distinct impression that the majority's decision represents a sound construction of the actual language of Inland Rule 16 in the light of navigational realities. Certainly, it would be a judicial gloss upon the language of Congress to read the statutory provision as requiring in every case and regardless of the circumstances that vessels fully stop their engines before proceeding to navigate with caution. The difficult question will always be the application of the existing circumstances criteria, the difficulty which is inherent in the necessity of applying language which is necessarily abstract to a degree to situations which are concrete in their totality. After having read and considered both opinions, and without having the benefit of the full record, the writer of this survey is not prepared to be too critical of the panel majority. The existing circumstances appear to have been fully considered and intelligently applied to the facts as outlined in the opinion.

As the reader is probably aware, there exists in admiralty the basic rule that where the fault of both vessels has acted in some manner to cause a collision, damages are divided, each vessel bearing half the total damage to both vessels.[61] The harshness of this mutual-fault, divided-damages rule is sometimes mitigated by the operation of the so-called "major-minor fault" rule in cases where one vessel is grossly negligent while the other's fault is minor and/or highly technical.[62] Such a rule, however, is limited to cases involving collision between vessels and does not apply in non-collision cases.[63] While the setting down of a

59. *Id.* at 351.

60. Hess Shipping Corp. v. S.S. Charles Lykes, 424 F.2d 633 (5th Cir. 1970).

61. GILMORE & BLACK at 402.

62. *Id.* at 402-4.

63. Transcontinental Gas Pipeline Corp. v. The Mobile Drilling Barge, 424 F.2d 684, 689-90 (5th Cir. 1970). *See also* Halycon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282

submersible drilling barge in such a way that it comes in contact with and damages a submerged pipeline may be a collision in the venacular sense of the word, it does not constitute a collision between vessels for the purpose of the application of either the divided damages rule or its corollary, the "major-minor fault" doctrine.[64]

The question proximate cause was revisited in an admiralty context within the period of this survey.[65]

> Generally, proximate cause in the admiralty context is defined as "that cause which in a direct, unbroken sequence produces the injury complained of and without which such injury would not have happened."[66]

Such a definition describes a cause-in-fact principle distinct from the common-law concept of proximate cause which is generally a question of the extent of the tortfeasor's duty.[67] At the same time, in determining causation in maritime matters, the applicability of such doctrines as last clear chance and the interruption of negligence by subsequent intervening negligence is questionable.[68] The reticence of the admiralty courts to hold that a subsequent wrongful act by one party breaks the chain of causation connecting an incident with the prior negligence of the other party was judicially noted.[69]

In cases of marine collision the basic damage doctrine is *restitutio in integrum*.[70] The application of this doctrine to a case involving a collision between a vessel and an offshore drilling platform entitled the owners of the platform to recover profits lost during the resultant suspension of production even though because of the nondepletion of the reservoir of economically extractable oil, the platform owner did not lose or otherwise waste any capital assets.[71] The owners had lost the use of their capital investment for the period of the suspension, and the fact that the same amount of profit could be made at a later time with the same investment of capital by removing from the ground a like quantity

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(1952); Empire Seafoods, Inc. v. Anderson, 398 F.2d 204 (5th Cir. 1968), *cert. denied*, 393 U.S. 983 (1968).

64. 424 F.2d at 690.

65. Olympic Towing Corp. v. Nebel Towing Co., 419 F.2d 230 (5th Cir. 1969), *cert. denied*, 397 U.S. 989 (1970).

66. *Id.* at 233. *See also* Olsen v. States Line, 378 F.2d 217, 221 n.7 (9th Cir. 1967).

67. 419 F.2d at 233.

68. Horton & Horton, Inc. v. T.S. J.E. Dyer, 428 F.2d 1131, 1135 (5th Cir. 1970).

69. *Id.*

70. Continental Oil Co. v. S.S. Electra, 431 F.2d 391 (5th Cir. 1970), *cert. denied*, 397 U.S. 911 (1970).

71. *Id.*

of oil at the same site did not alter the fact that for the period of suspension the owners were "out-of-pocket" the return on their investment.[72]

The injured party is entitled to be placed in the same poeition he occupied before the collision.[73] The damages assessed should be sufficient to restore the vessel to the condition in which she was at the time the collision occurred.[74] Even if repairs are never effected, an injured shipowner is entitled to recover the estimated cost of repairs.[75] By derivation from this rule, a shipowner who is injured as a result of collision in an American port or in the reasonable vicinity of American shores is entitled to assess damages with respect to the cost of repairs in an American shipyard at least where he is not effecting repairs in a lower cost country.[76]

SEAMEN AND MARITIME WORKERS—THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT OF 1927

The reader interested in fully understanding the industrial-accident coverage provided maritime employees through the Longshoremen's and Harbor Workers' Compensation Act[77] is referred to the basic overview in Gilmore and Black, *The Law of Admiralty*.[78] Portions of the discussion in the recommended treatise have been overtaken by a clarifying Supreme Court decision, and should be read in conjunction with the opinion in *Nacirema Operating Co. v. Johnson*.[79]

Unfortunately, the clearly ascertainably congressional intent to provide an exclusive system of no fault compensation for harbor workers subject to administrative regulation and judicial review has been considerably distorted by a judicially conceived end run.[80] While it is not our purpose to launch an exhaustive discussion into the essentially social philosophy underlying the judicial reconstruction of certain classes of harbor workers as "seamen" and the extension to them of certain rights having the ultimate effect of allowing a recovery by the harbor worker

72. 431 F.2d 391.

73. Tug June S. v. Bordagain Shipping Co., 418 F.2d 306 (5th Cir. 1969).

74. *Id. See also* The Baltimore, 75 U.S. 377 (1869).

75. 418 F.2d 306; Bleakley Transp. Co. v. Colonial Sand & Stone Co., 245 F.2d 576 (2d Cir. 1957).

76. 418 F.2d 306.

77. 33 U.S.C. § 901 (1964).

78. GILMORE & BLACK at 337-58.

79. 396 U.S. 212 (1969). In this respect, *see also* Labit v. Carey Salt Co., 421 F.2d 1333 (5th Cir. 1970).

80. GILMORE & BLACK at 361-74.

from his employer for injuries otherwise compensable under either the federal or a state system of workmen's compensation, a somewhat over-simplified sketch will be provided as an introduction to the uninitiated reader. Under traditional admiralty law, a shipowner had a duty to use due diligence to provide a seaworthy ship and was responsible for injuries resulting from a failure to perform this duty. In 1944, the Supreme Court of the United States converted this duty to exercise due diligence into an absolute duty resulting in a form of strict liability without the necessity for establishing fault.[81] Two years later the Supreme Court held that a longshoreman, whose exclusive remedy against his own stevedore employer was under a compensation act, could sue a non-negligent shipowner to recover damages for injuries resulting from the unseaworthiness of the owner's vessel.[82] Attempts[83] by the intermediate level federal courts to restrict the judicially conceived substantive rights to longshoremen employees of stevedores was unsuccessful.[84] The concept was soon expanded to introduce into the body of the law a new creature known as the *Sieracki* seaman or the de facto seaman or, from the period under survey, the "pseudo seaman."[85] Almost simultaneously, and this time with the cooperation of the intermediate level federal courts, the concept of unseaworthiness was drastically expanded to cover conditions miles removed from the common understanding of the term.[86]

In 1956 the Supreme Court completed the third side of the triangle.[87] A majority of the Supreme Court rejected a stevedore's contention that the Longshoremen's and Harbor Workers' Compensation Act, in limiting the stevedore-employers' liability to the compensation provided for in the act, had barred the shipowner from recovering indemnity from the stevedore for damages for injury for which the shipowner had been held liable to an employee of the stevedore (a *Sieracki* seaman) and which had resulted from the stevedore's breach of a contractual duty (the warranty of workmanlike service) owed the shipowner. Basically, the warranty in question is breached by the stevedore's vicariously bringing into play the "unseaworthiness" which forms the basis of the first-party liability. Considering the vast and expanding sweep of unseaworthiness

81. Ahnich v. Southern S.S. Co., 321 U.S. 96 (1944).
82. Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).
83. Guerrini v. United States, 167 F.2d 352 (2d Cir. 1948).
84. Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953).
85. Burrage v. Flota Mercante Gran Colombiana, S.A., 431 F.2d 1229, 1231 (5th Cir. 1970).
86. By way of example, *see* 431 F.2d 1229.
87. Ryan Stevedoring Co., Inc. v. Pan Atlantic S.S. Corp., 350 U.S. 124 (1956).

as a liability concept, it is not surprising to note the extensive number of cases during this survey period in which the *Sieracki* seaman's suit against a shipowner resulted in an ultimate recovery from the employer contrary to the liability foreclosures contained in the compensation acts.

During the survey period the court found, or more accurately affirmed findings of, unseaworthiness based upon grease on a shipboard ladder,[88] rotten tagline on hatchcover,[89] worn dies on drilling barge's drill tongs,[90] open manhole,[91] assignment of insufficient personnel to accomplish task,[92] and the defective knee of a longshoreman's partner.[93] The combination of unlatched and unlashed hatch beams and a brakeless winch constituted unseaworthiness when a piece of stevedoring equipment being manuvered inside a hold by use of the defective winch knocked a beam out of its socket.[94] The combination of a ship repairman's method for discharging a routine cleaning task and the failure to furnish adequate tools and personnel for the safe discharge of the task constituted unseaworthiness.[95]

The doctrine has been extended by the Fifth Circuit beyond the physical confines of the vessel. Coffee beans which leaked from imperfect bags while being discharged onto a wharf resulted in the vessel's being held unseaworthy and liable for injuries sustained by a "psuedo seamen" who slipped on beans and fell on the wharf.[96] A longshoreman injured on shore by a defect in an auger used to push rice from boxcars to a shoreside elevator hopper was allowed to recover on the theory that the vessel then being loaded was unseaworthy.[97] Other

88. Telfair v. Zim Israel Navigation Co., 428 F.2d 127 (5th Cir. 1970).

89. 431 F.2d 520.

90. Thibodeaux v. Towan Drilling Co., 429 F.2d 573 (5th Cir. 1970).

91. Manning v. M.V. Sea Road, 417 F.2d 603 (5th Cir. 1969).

92. Moschi v. S.S. Edgar F. Luckenbach, 424 F.2d 1060 (5th Cir. 1970), one of the few unseaworthiness cases involving a shipboard, honest-to-goodness seaman of the non-Sierackiack variety.

93. Dillion v. M.S. Oriental Inventor, 426 F. 2d 977 (5th Cir. 1970), *cert. denied*, ___ U.S. ___, 91 S. Ct. 140 (1970).

94. Phipps v. S.S. Santa Maria, 418 F.2d 615 (5th Cir. 1969).

95. Guidry v. Texaco, Inc., 430 F.2d 781 (5th Cir. 1970).

96. 431 F.2d 1229.

97. Chagois v. Lykes Bros. S.S. Co., 432 F.2d 388 (5th Cir. 1970). The hopper took the rice to the top of an elevator where it poured down a spout into the ship's hold. The expanded warranty of seaworthiness does not depend on the plaintiff's status or location but upon the type of work he does and its relation to the ship. The court then concludes that since "the work of loading and unloading the ship is, without a doubt, work in the ship's service, and any longshoreman injured while loading or unloading a ship may avail himself of the unseaworthiness remedy." *Id.* at 391. Compare this with the tradition-work-of-seaman test which another panel applied in Drake v. E.I. Dupont de Nemours & Co., 432 F.2d 276 (5th Cir. 1970). We suggest that the latter approach is the sounder of the two and more consistent with the controlling authority. United Pilots Ass'n v. Halecki, 358 U.S. 613 (1959).

circuits have refused to allow longshoremen recovery for unseaworthiness when the alleged defect was not part of the vessel or its once loaded cargo.[98]

The Fifth Circuit attempts to justify its generally rejected extension on considerations which within the distribution of powers would appear to be clearly legislative.

> Lykes makes much of the fact that it had no authority or control over the loading method adopted by Stevedores or the equipment furnished by them. It is clear, however, that the shipowner's lack of control over shore-based loading equipment is irrelevant to his liability for unseaworthiness . . . . Unseaworthiness liability is "essentially a species of liability without fault" imposed on the shipowner because of his greater ability to distribute the loss throughout the shipping community that receives the benefit of the longshoreman's work and that should bear the cost of his injury.[99]

For examples of the operation of interrelated expansionist judicial doctrines in this area, the reader is invited to read *Dillon v. M.S. Oriental Inventor*,[100] *Law v. Victory Carriers, Inc.*,[101] and *Manning v. M.V. Sea Road*.[102]

After reading these, the reader doubtless will be relieved to know that there is no presumption of unseaworthiness, the plaintiff having the burden of proof on this issue.[103] Resort to the doctrine of res ipsa loquitur is not warranted in the absence of a showing of some malfunction, failure or misuse of a vessel, its appurtenances or gear, or some defect therein.[104]

There are several defenses to the unfettered operation of the unseaworthiness doctrine. The first is contributory, or more correctly comparative, negligence.[105] A second exception prevents the warranty of seaworthiness from extending to cases where the condition under

98. Forkin v. Furness Withy & Co., 323 F.2d 638 (2d Cir. 1963); McKnight v. N.M. Patterson & Sons, Ltd., 286 F.2d 250 (6th Cir. 1960).

99. 432 F.2d at 395. *See also* Law v. Victory Carries, Inc., 432 F.2d 376 (5th Cir. 1970), *cert. granted*, ___ U.S. ___, 91 S. Ct. 937 (1971), the most regally assuming decision of the survey period. For a more traditional view in a true-seaman context, *see* Little v. Green, 428 F.2d 1061, 1067 (5th Cir. 1970), *cert. denied*, ___ U.S. ___, 91 S. Ct. 366 (1970).

100. 426 F.2d 977.

101. 432 F.2d 376.

102. 417 F.2d 603.

103. Bowser v. Lloyd Brasileiro S.S. Co., 417 F.2d 779 (5th Cir. 1969).

104. Rabb v. Canal Barge Co., 428 F.2d 201 (5th Cir. 1970), a short but well-reasoned opinion. *See also* 428 F.2d at 1066.

105. 418 F.2d 615; 424 F.2d 1060.

complaint was created by operational negligence occurring at the same moment as the injury.[106] This is the sub-doctrine of "instantaneous unseaworthiness" or "operational negligence." A third concept, somewhat related to the second, is called "transitory condition," which bars recovery where the injury is caused by a transitory condition resulting from the course of performing a repair contract where the repairman alone has present custody and control of the vessel.[107]

In several cases the court emphasized that only a seaman or a "pseudo seaman" is entitled to the warranty of seaworthiness.[108] This might lead the reader, like most believers in analytical jurisprudence, to conclude that the issue is a two-stepped process which begins with a warranty of rather well defined scope and territorial reach and ends with the spotlight of inquiry focused upon the question of whether a claimant is a seaman or a de facto seaman. Unfortunately, a result-oriented jurisprudence is less careful of the integrity of legal concepts. The reader is invited to read the survey's two most expansionist decisions in this area and to ascertain, if he can, whether *Law v. Victory Carriers, Inc.* and *Chagois v. Lykes Bros. S.S. Co.* expanded the concept of the "pseudo seaman" or the limits of the warranty or both or neither.

One vestige of analytical jurisprudence remains; the unseaworthiness must relate to a vessel.[109] A fixed drilling platform is not such a vessel,[110] and while a floating drydock may under certain circumstances be a vessel, it is not when it is moored to a bank as a more or less permanent shipyard fixture.[111] Nor is there any warranty of seaworthiness where the vessel has been withdrawn from navigation, is in a drydock for repair, is without a crew and motive power, and is unequipped for sailing.[112]

The shipowner's indemnification rights have been previously noted.

106. Vaner v. Luckenbach Overseas Corp., ___ U.S. ___, 91 S. Ct. 514 (1971); Timpson v. M.S. Ecuador Maru, 425 F.2d 1209 (5th Cir. 1970); Robertson v. M/S Sanyo Maru, 424 F.2d 520 (5th Cir. 1970), *cert. denied*, ___ U.S. ___, 91 S. Ct. 59 (1970); Patterson v. Humble Oil and Refining Co., 423 F.2d 883 (5th Cir. 1970), *cert. denied*, ___ U.S. ___, 91 S. Ct. 863 (1971); Grigsky v. Coastal Marine Serv. of Texas, Inc., 412 F.2d 1011 (5th Cir. 1969).

107. Parker v. Cargill, Inc., 417 F.2d 772 (5th Cir. 1969), *cert. denied*, 397 U.S. 973 (1970). Claim was that injury was caused by portable lantern left hanging on the rung of a shipboard ladder by another employee of the claimant's employer, a corporate repairer and cleaner which had exclusive custody and control of vessel for contracted cleaning operations.

108. Davidson v. Oil Field Maintenance Co., 423 F.2d 1115 (5th Cir. 1970); 422 F.2d 377.

109. Chahoc v. Hunt Shipyard, 431 F.2d 576 (5th Cir. 1970); 432 F.2d 1115.

110. 432 F.2d 1115.

111. 431 F.2d 576. *Cf.* Russell v. Greenville Shipbuilding Corp., 428 F.2d 1168 (5th Cir. 1970), *cert. denied*, ___ U.S. ___, 91 S. Ct. 878 (1971).

112. Baum v. United States, 427 F.2d 215 (5th Cir. 1970), *cert. denied*, ___ U.S. ___, 91 S. Ct. 1373 (1971).

This area was active during the survey period. The extensive sweep of a maritime contractor's warranty of workmanlike service was the subject of at least one decision.[113]

> The notion of workmanlike performance certainly encompasses an obligation by the contractor to take notice of those deficiencies and hazards likely to give rise to damage to life, limb, or property and then take requisite action depending on the nature of the relationship of the parties and their contractual obligations, express or implied, either to eliminate or minimize the hazard or to stop work until the situation is corrected.[114]

As a warranty, the indemnification process does not turn on notions of ordinary care, negligence, and the like.[115] The knowledge of the injured workman may itself be quite enough to set in motion duties of workmanlike service even though the knowledge is never brought home to any supervisory employee.[116] But, since the maritime contractor is not a virtual insurer as to every risk which may result in injury to his employees, he is not chargeable to hidden defects which are not discoverable by reasonable though cursory inspection.[117] Since, however, the doctrine of res ipsa loquitur has been applied to maritime-contractor/shipowner indemnity actions,[118] the contractor's position will have to be carefully documented and proven.

JONES ACT

The background and general provisions of the Jones Act[119] have been summarized by Gilmore and Black.[120] Only a genuine seaman is entitled to the rights and remedies afforded by the statute.[121] In order to maintain a claim under this statute, the claimant must be a member of a vessel's crew.[122] Occasional shipboard work will not constitute a marine worker a seaman for purposes of the act. Transportation in a crew boat from and to a fixed drilling platform does not give the transported employee

113. 431 F.2d 1229.
114. *Id.* at 1232.
115. 430 F.2d 781.
116. 431 F.2d 1229; United States Lines Co. v. Williams, 365 F.2d 332, 335 (5th Cir. 1966).
117. Scott v. S.S. Ciudad de Ibaque, 426 F.2d 1105 (5th Cir. 1970).
118. *Id.*
119. 46 U.S.C. § 688 (1964).
120. GILMORE & BLACK at 279-315.
121. 423 F.2d 1115; 422 F.2d 377.
122. 423 F.2d 1115.

seaman status.[123] Occasional work on a power boat used to move barges into position relative to a loading conveyor does not make the loader's personnel seamen as a matter of law.[124] However, workmen injured while employed on fixed drilling platforms should be afforded seaman status if they are both permanently assigned to a vessel or perform a substantial part of their work on a vessel *and* their duties contribute to the function of the vessel or the accomplishment of its mission.[125]

The Jones Act predicates recovery on fault; however, the seaman may recover if his employer's negligence played any part, even the slightest, in producing such injury.[126] On the other hand, in order to recover under the Act, a seaman must have sustained the injury under claim in the course of his employment and the relationship of employee and employer must exist.[127] In such a case, the fact that a seaman was injured ashore and not on board the vessel does not defeat his right to the remedy of the act.[128]

ASSORTMENT AND SAMPLES

The widely varied nature of the Fifth Circuit's work within the maritime field coupled with the breadth of the subject matter of the law of admiralty makes it extremely difficult to survey the period completely within reasonable limitations of space or time. Certain areas represented by only one or two significant cases have been grouped within the last portion of this survey. This should not be taken to imply that these cases are of minor importance. Rather, these areas within the law of admiralty did not generate a significant amount of appellate-level litigation during the survey period in question.

The wrongful death action in admiralty was considered in the light of the Supreme Court's decision in *Moragne v. States Marine Line, Inc.*[129] Unfortunately, the surveyed opinion was superficial and failed to deal with voids which the Supreme Court's decision left in the law,[130] even though several of these would appear clearly to have been involved in the case. In another choice-of-law question,[131] a panel discussed the proper

123. 423 F.2d 377.

124. 421 F.2d 1333.

125. 422 F.2d 377; 421 F.2d 1333; Kimble v. Noble Drilling Corp., 416 F.2d 847 (5th Cir. 1969), *cert. denied*, 397 U.S. 918 (1970); Offshore Co. v. Robison, 266 F.2d 769 (5th Cir. 1959).

126. Stacey v. Sea-Drilling Corp., 424 F.2d 1272 (5th Cir. 1970).

127. Pennington v. Pac. Coast Transp. Co., 419 F.2d 122 (5th Cir. 1969).

128. Delancey v. Motichek Towing Serv., Inc., 427 F.2d 897 (5th Cir. 1970).

129. 398 U.S. 375 (1970).

130. Proper party to bring action, survival of a right of action, analogous statutory provisions to be incorporated, etc.

131. Huson v. Otis Eng'r Corp., 430 F.2d 27 (5th Cir. 1970). The decision seems a strained and unconvincing interpretation of the statute in question.

delay limitations period to be applied to actions covered by section 3(a)(2) of the Outer Continental Shelf Lands Act.[132]

Three cases[133] dealt with secured transactions involving the Ship Mortgage Act of 1920.[134] Another case involved a rather insubstantial and consequently unsuccessful salvage claim.[135] The necessary nature of the services of a compulsory pilot was the basis of a case[136] involving the Federal Maritime Lien Act of 1910.[137] The rights of wharfingers to preferred treatment for wharfage in maritime lien foreclosures were considered.[138]

Shipping articles and a seaman's rights to wages was the subject controversy of one highly interesting opinion.[139] Two cases involved towage.[140] In one instance[141] the court was called upon to construe the so-called Wreck Statute.[142]

The watchman clause in a standard policy of hull insurance was enforced in a well written and welcomed opinion.[143] And another case considered the "assailing thieves" peril of the typical hull policy,[144] a note of peril upon which this survey may appropriately close in contemplation of action.

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132. 43 U.S.C. § 1333(a)(2) (1964).

133. State of Israel v. M.V. Nili, 435 F.2d 242 (5th Cir. 1970); J. Ray McDermott & Co. v. Vessel Morning Star, 431 F.2d 714 (5th Cir. 1970); C.I.T. Corp. v. Oil Screw Peggy, 424 F.2d 767 (5th Cir. 1970).

134. 46 U.S.C. § 951 *et seq.* (1964).

135. 424 F.2d 307.

136. Ajubita v. S.S. Peek, 428 F.2d 1345 (5th Cir. 1970).

137. 46 U.S.C. §§ 971-5 (1964).

138. Florida Bahamas Lines, Ltd. v. Steel Barge Star 800, ___ F.2d ___ (5th Cir. 1970); State of Israel v. Metropolitan Dade County, Florida, 431 F.2d 925 (5th Cir. 1970). The latter case also involved the ill-fated (financially) attempt to convert a once-proud Isreali liner into the Caribbean cruise ship M.V. Nili. *See* 435 F.2d 242. *See also* Stern, Hays & Lang, Inc. v. M.V. Nili, 407 F.2d 549 (5th Cir. 1969).

139. Bunn v. Global Marine, Inc., 428 F.2d 40 (5th Cir. 1970).

140. Tidewater Marine Activities, Inc. v. American Towing Co., Inc., ___ F.2d ___ (5th Cir. 1970); Humble Oil & Refining Co. v. Tug Crochet, 422 F.2d 602 (5th Cir. 1970).

141. 422 F.2d 602.

142. 33 U.S.C. § 409 (1964).

143. F.S. Walker & Sons, Inc. v. Valentine, 431 F.2d 1235 (5th Cir. 1970).

144. S. Felicione & Sons Fish Co. v. Citizens Cas. Co. of N.Y., 430 F.2d 136 (5th Cir. 1970), *cert. denied*, ___ U.S. ___, 91 S. Ct. 936 (1971).